



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 3600-99
13 December 1999

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 9 December 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the comments of your counsel.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the rationale of the Physical Evaluation Board (PEB) panel which considered your case on 9 July 1997, a copy of which is attached. The Board concluded that the rating assigned by the PEB more accurately reflects the degree of impairment caused by your back condition than does the rating assigned by your local Department of Veterans Affairs office. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official

records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure

RATIONALE:

THE MEMBER IS A 33 YEAR OLD [REDACTED] WITH ABOUT 13 YEARS OF SERVICE AT THE TIME OF HIS APPEARANCE BEFORE A MEDICAL BOARD AT BEAUFORT NAVAL HOSPITAL ON 26 DECEMBER 1996 WITH THE DIAGNOSIS:

- (1) HERNIATED NUCLEUS PULPOSUS LUMBAR FIVE - SACRAL ONE, STATUS POST LAMINECTOMY.

THE PEB RECORD REVIEW PANEL CONSIDERED THE CASE ON 26 MARCH 1997 AND FOUND THE MEMBER UNFIT FOR DUTY BECAUSE OF PHYSICAL DISABILITY RATABLE AT 10% UNDER V.A. CODE 5295. THE MEMBER DISAGREED WITH THIS FINDING AND DEMANDED A FORMAL HEARING.

A FORMAL HEARING WAS CONDUCTED 9 JULY 1997 WITH [REDACTED] G. [REDACTED] C, AS PRESIDING OFFICER AND [REDACTED] USNR, AND [REDACTED] N, MC, USN, AS PANEL MEMBERS. THE MEMBER WAS REPRESENTED BY LIEUTENANT [REDACTED], JAGC, USNR.

THE MEMBER APPEARED AT THE HEARING REQUESTING TO BE FOUND UNFIT FOR DUTY WITH DISABILITY RATINGS OF 20% UNDER V.A. CODE 5295 AND 10% UNDER V.A. CODE 8520 FOR A TOTAL RATING OF 30% AND PLACEMENT ON THE TDRL AND THAT HIS CONDITION BE CONSIDERED COMBAT RELATED. THE MEMBER ALLEGED THAT HE FIRST HAD LOW BACK PAIN IN DECEMBER 1993; THAT HIS SYMPTOMS NOW ARE INTERMITTENT BUT DAILY LOW BACK PAIN BROUGHT ON BY PROLONGED STANDING OR SITTING; THAT HE IS UNABLE TO SIT MORE THAN 10 TO 15 MINUTES OR STAND MORE THAN 15 TO 30 MINUTES; THAT HE HAS DIFFICULTY FALLING ASLEEP AND FREQUENTLY IS AWAKENED BY PAIN (EVERY NIGHT); THAT HE GETS TINGLING AND NUMBNESS IN HIS LEGS FROM THE BUTTOCKS TO THE FEET AFTER SITTING FOR MORE THAN 15 MINUTES; THAT IF HE WALKS TOO LONG, HE GETS WEAKNESS NAD LIMPING; THAT BENDING FORWARD OR BACKWARD IS UNCOMFORTABLE, BACKWARD BEING WORSE THAN FORWARD; THAT HE GOES TO PHYSICAL THERAPY TWICE A WEEK AND DOES HOME EXERCISES DAILY; THAT A RECENT STEROID TAPER GAVE NO RELIEF; THAT TYLENOL SEEMS TO TAKE THE EDGE OFF; THAT HE CANNOT DO THE LIFTING AND BENDING AND PROLONGED STANDING REQUIRED IN HIS M.O.S. OF 6469; THAT HE CANNOT RUN, DO SITUPS, OR GET INTO THE KNEELING OR PRONE POSITIONS TO QUALIFY WITH THE RIFLE; THAT HE IS LIMITED TO ADMINISTRATIVE DUTIES NOW AND IS ALLOWED TO GO HOME EARLY DUE TO BACK PAIN 2 TO 3 TIMES A MONTH; THAT HIS ORIGINAL INJURY WAS WHILE RIDING IN THE "CONVINCER," A DEVICE USED TO CONVINCE PEOPLE TO WEAR SEATBELTS; AND THAT HIS INJURY SHOULD BE CONSIDERED COMBAT RELATED BECAUSE SECNAV INSTRUCTION 1850.4C GIVES EXAMPLES OF CONDITIONS SIMULATING WAR THAT INCLUDES COLLISION OF VEHICLES IN FIELD EXERCISES AND IN THIS CASE THE RIDING IN THE CONVINCER WAS MANDATED BY THE MEMBER'S COMMAND TO SIMULATE COLLISION OF 2 VEHICLES. TO SUPPORT HIS REQUEST THE MEMBER PRESENTED A LETTER FROM HIS NEUROSURGEON, [REDACTED] MC, USA, AT EISENHOWER ARMY MEDICAL CENTER, COPIES OF HEALTH RECORD ENTRIES MADE SINCE THE SUBMISSION OF THE MEDICAL BOARD, A COPY OF

THE NARRATIVE DISCHARGE SUMMARY FROM HIS HOSPITALIZATION FOR THE DISCECTOMY AT THE AUGUSTA V.A. MEDICAL CENTER, AND NON-MEDICAL EVIDENCE LETTERS FROM HIS SUPERVISOR AND HIS OFFICER-IN-CHARGE. THE MEMBER ALSO MADE HIS HEALTH AND SERVICE RECORDS AVAILABLE FOR REVIEW.

AFTER CAREFUL REVIEW OF ALL THE AVAILABLE EVIDENCE AND BASED ON UNANIMOUS OPINION, THE HEARING PANEL FINDS THE MEMBER IS UNFIT FOR FULL DUTY IN THE U.S. MARINE CORPS BECAUSE OF PHYSICAL DISABILITY. THE RECORD AND EVIDENCE PRESENTED DOCUMENTS THAT THE MEMBER REQUIRED A LAMINECTOMY AND DISCECTOMY AT L5-S1 ON 30 SEPTEMBER 1996 BUT CONTINUES TO HAVE CHRONIC LOW BACK PAIN AND INTERMITTENT NUMBNESS AND TINGLING IN HIS LEFT LEG THAT LIMITS HIS ACTIVITIES AND INTERFERES WITH THE ADEQUATE PERFORMANCE OF REQUIRED MILITARY DUTIES.

THE MEDICAL BOARD REPORTED THE EXAM AS SHOWING A WELL HEALED SURGICAL SCAR WITH NO LUMBAR DEFORMITY, NO MUSCLE SPASM, NEGATIVE STRAIGHT LEG RAISE BILATERALLY, NO MOTOR, SENSORY, OR REFLEX DEFICITS IN THE LOWER EXTREMITIES, AND INTACT HEEL AND TOE WALKING. THE LETTER OF 26 JUNE 1997 FROM THE MEMBER'S NEUROSURGEON REPORTED EXAM FINDINGS THAT WERE BASICALLY IDENTICAL TO THOSE ON THE MEDICAL BOARD. SINCE THERE IS NO LUMBAR PARAVERTEBRAL MUSCLE SPASM, THE DISABILITY RATING UNDER V.A. CODE 5295 IS APPROPRIATELY SET AT 10% AND DOES NOT MEET THE CRITERIA FOR THE 20% RATING. SINCE THERE ARE NO NEUROLOGIC DEFICITS NOTED ON EXAM, A SEPARATE RATING UNDER V.A. CODE 8520 IS NOT WARRANTED.

THE ORIGINAL BACK INJURY IN THE "CONVINCER" WAS NOT COMBAT RELATED SINCE THIS IS NOT A MILITARY PIECE OF EQUIPMENT, BUT RATHER A MECHANICAL DEVICE USED TO CONVINCE PEOPLE TO USE THE SEAT BELTS IN THEIR CARS. THERE IS NO EVIDENCE THAT THIS WAS BEING USED TO SIMULATE CONDITIONS OF COMBAT. THEREFORE, THE DISABILITY IS NOT CONSIDERED TO BE COMBAT RELATED.